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Recent Developments in Tort Law and the Federal Courts

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By John W. Wade**

Introduction

During the past two or three decades, the law of torts has experienced more extensive change than perhaps any other field of the common law. To a surprising extent tort law is being substantially remade. Under the rule of *Erie Railroad v. Tompkins*,[1] this of course spills over into the federal courts in diversity cases. This ferment has become contagious and has affected several aspects of the federal law of torts as well. Any thorough study of the extent to which the work of the federal courts is changing should give attention to these matters.

In this Article I propose to analyze briefly the nature of the developments in tort law in the state courts and to offer an interpretation of their significance, and then to consider in somewhat greater detail certain areas of federal tort law that have recently been experiencing substantial modification. These areas are (1) governmental tort immunities, (2) tort liability "implied" from federal legislation and (3) the effect of the First Amendment on tort actions involving written or oral speech.

I. Changes in Tort Law in State Courts

The first significant mutation involved the question of whether a child has a cause of action for an injury incurred before its birth. Prior to 1946, courts unanimously held that the child had no cause of action. Beginning with a decision of the federal district court for the District of Columbia in that year,[2] the law has complete-

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*Ed. Note: This Article is based on a transcription of a talk given at the annual Judicial Conference on the Sixth Federal Circuit held in the late summer of 1982, with the theme "The Work of the Federal Courts: Is It Changing or Not?"

While the talk has been edited for publication and footnotes have been added, it has been permitted to retain an informal approach pursuant to Dean Wade's request. No attempt has been made to provide an exhaustive treatment of the issues raised.

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[1] 304 U.S. 64 (1938).

[2] Bonbrest v. Katz, 65 F Supp. 138 (D.D.C. 1946).

ly changed and courts now unanimously hold that the action will lie.[3] A second area of tort law experiencing extensive and broad revision is tort immunity of various types: governmental,[4] charitable institutions,[5] and intra-familial.[6] The wave of change proceeded to the field of products liability, where the completely new approach of strict tort liability for products was created and modifications in product liability for negligence and implied warranty were made.[7]

Another area that has experienced substantial modification is the effect of plaintiff's fault in a tort action. Formerly this was limited to the doctrines of contributory negligence and assumption of risk, with their ramifications. Now the vast majority of the states have comparative negligence in one form or another.[8] Change has also occurred in the area of landowner's tort liability: the hierarchy of types of persons coming onto the premises is being merged into a single group for an ordinary negligence action. The nature of the plaintiff's status is now being treated merely as one of the circumstances to be taken into consideration.[9]

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[3] For the current rule, see RESTATEMENT (SECOND) OF TORTS § 869 (1979). See RESTATEMENT (SECOND) OF TORTS § 869 reporter's note (1982) for a list of cases supporting the proposition.

[4] *See* RESTATEMENT (SECOND) OF TORTS §§ 895A-895C (1979). For a list of cases following this proposition, see RESTATEMENT (SECOND) OF TORTS §§ 895A-895C reporter's note (1982).

[5] *See* RESTATEMENT (SECOND) OF TORTS § 895E (1979). See RESTATEMENT (SECOND) OF TORTS § 895E reporter's note (1982) for a list of cases supporting this proposition.

[6] *See* RESTATEMENT (SECOND) OF TORTS §§ 895F-895G (1979). For citation to cases following this proposition, see RESTATEMENT (SECOND) OF TORTS §§ 895F-895G reporter's note (1982).

[7] *See* RESTATEMENT (SECOND) OF TORTS §§ 402A-402B (1979); Wade, *Tort Liability for Products Causing Physical Injury and Article 2 of the U.C.C.*, 48 MO. L. REV. 1 (1983); Wade, *On the Nature of Strict Tort Liability For Products*, 44 MISS. L.J. 825 (1973).

[8] *See* Wade, *Comparative Negligence—Its Development in the United States and Its Present Status in Louisiana*, 40 LA. L. REV. 299 (1980). *See also* UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 35 (Supp. 1983). For a discussion of comparative negligence in Kentucky, see Rogers & Shaw, *A Comparative Negligence Checklist To Avoid Future Unnecessary Litigation*, 72 KY. L.J. 25 (1983-84).

[9] The seminal case is Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968) ("Although the plaintiff's status as a trespasser, licensee, or invitee may, in the light of the facts giving rise to such status, have some bearing on the question of liability, the status is not determinative").

Cf. Kermarec v Compagnie Generale Transatlantique, 358 U.S. 625, 632 (1959) (holding that a shipowner owes a duty of reasonable care under the circumstances toward

Many changes have also occurred in the field of professional negligence.[10] There are numerous additional changes, but it would divert from the central theme of this Article to attempt to describe them in full detail.[11]

What does all of this mean? My suggestion is that the more thoughtful judges have come to the conclusion that the common law of torts needs to be kept up to date, that it needs to be in conformity with our current mores and ethical ideals, and that the appellate judges should assume the responsibility for performing this task. This has not been stated in express words in the opinions, but an examination of the cases reveals that this is now coming to be the judicial attitude toward the common law, at least in the field of torts. The common law has been continually developing throughout its history and the process is now being much more frankly and openly carried out.[12]

This performance may sound as if it is a completely new occurrence, but a similar development has happened several times in the history of the common law. Around the beginning of the nineteenth century the whole concept of negligence was brought into the law by the courts. In that same general period, commercial law became a part of the common law by absorbing the customs of merchants. Lord Mansfield was primarily responsible for this. He also brought in the law of quasi-contract, which has since turned into our modern restitution.

Several years later, there was another period in which substantial change occurred in the law But that period coincided with the Industrial Revolution and the changes were for different reasons. Courts began to limit tort rights during this time. In this

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all visitors on board his ship for purposes not inimical to the shipowner's legitimate interests, but declining to incorporate into admiralty law the common law distinctions between licensees and invitees).

[10] *See, e.g.*, Woodruff v.Tomlin, 616 F.2d 924 (6th cir. 1980) (attorney's standard of care in conducting litigation); Roberts v. Tardif, 417 A.2d 444 (Me. 1980) (national standard of care for doctors); Scott v. Bradford, 606 P.2d 554 (Okla. 1979) (informed consent). For a general treatment of this issue see D. LOUISELL & WILLIAMS, MEDICAL MALPRACTICE (1969); R. MALLEN & LEVIT, LEGAL MALPRACTICE (2d ed. 1981).

[11] For a comprehensive list of state court cases overruling prior tort law, see R. KEETON, VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW 169 app. (1969).

[12] For further discussion of this concept, see Wade, *The Most Important Tort Change in the Third Quarter of the Twentieth Century*, 20 ATLA L. REP. 413 (1977).

period, the defenses of contributory negligence, assumption of risk, the fellow-servant rule and matters of that sort became a part of the law of negligence.

Thus, it is not unusual to have periods of extensive change in the development of the common law. We are just more candid about it now. At one time, of course, the attitude was that the judges do not make the law, but instead they find it. They defined it, and occasionally the definers were somewhat more prophetic and had a clear channel to the "brooding omnipresence in the sky"[13] to determine the true state of the law The attitude was that the common law developed within itself. In the classic case of *MacPherson v. Buick Motor Co.*,[14] Judge Cardozo found that so many exceptions to the rule requiring privity of contract in a negligence action for harm caused by a dangerous product had developed that these exceptions had simply eroded the rule and had become the true rule, so that it was the responsibility of the court to declare it that way [15]

Today, with a more candid attitude, the indication is that when a particular rule of law is no longer in accord with our current concepts and ideals, it is the responsibility of the courts to bring the law into accord. One may well wonder how far this is going to go. It has been most prevalent in tort law, but is giving indications of spreading to other areas as well.[16]

In the law of torts, except for a few instances, such as defamation, the scope of liability has been broadened. Rules restricting the right of recovery have been eliminated or modified. These rules were usually for the purpose of controlling the jury At the earlier time, the courts were not ready to trust the jury, and they laid down rules of law to take the issue out of its hands. Some examples of where this occurred include immunities, landowner's liability, contributory negligence, assumption of risk and the requirement of privity. These were categoric rules, somewhat crude in application and perhaps justifying the appellation, "primitive."

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[13] Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[14] 111 N.E. 1050 (N.Y. 1916).

[15] *Id.* at 1054.

[16] See Wade, *supra* note 12, at 414, for the suggestion that the approach may spread to other areas of law.

In their first enthusiasm for changing these primitive restrictions, the courts often abolished them outright. Then they began to discover that they had gone too far, that they still needed to have some basis for reasonable control of the jury As a result, they have now begun to set up more sophisticated rules for maintaining control to reach a more balanced adjustment.[17]

The federal courts have also been doing something of this nature in the areas in which they apply common law. Thus, in admiralty law, the Supreme Court changed the rule about the effect to be given contributory negligence, substituting pure comparative negligence for the practice of dividing the recovery in half.[18] The Third Circuit adopted a rule of comparative causation[19] for the Virgin Islands that evolved out of the concepts of comparative negligence and strict liability [20] In a 1974 decision involving air traffic control,[21] the Seventh Circuit adopted a federal common law rule of comparative contribution.[22]

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[17] For example, certain adjustments became necessary when tort immunities were abrogated. *See* RESTATEMENT (SECOND) OF TORTS §§ 895B & comments c-e, (state immunity), 895F comment h (spousal immunity), 895G comment k (parental immunity).

> The first comparative negligence systems often allowed the jury to render a lump-sum verdict without any indication of how it was reached. Later systems require the jury to declare the total amount of plaintiff's damages and the percentages of fault of the parties. This makes it possible for the trial judge to determine if the jury knew what it was doing.

[18] United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975). The Court stated:

> We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault.

Id.

[19] *See* Murray v. Fairbanks Morse, Beloit Power Sys., Inc., 610 F.2d 149 (3d Cir. 1979).

[20] *Id.* at 153-63. The court concluded: "Unlike comparative negligence, comparative fault asks the trier of fact to allocate the loss solely on the causal connection between the faulty product, i.e., the defect and the injury, and the faulty conduct of the plaintiff and the injury." *Id.* at 163.

[21] Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

[22] *See id.* at 405.

II. GOVERNMENTAL IMMUNITIES AND THE FEDERAL COURTS

A. *Governmental Immunities Under the Federal Tort Claims Act*

I come now to the subject of the federal law of governmental immunities. This area is controlled by the Federal Tort Claims Act (FTCA),[23] which was enacted three and a half decades ago.

There have been some problems with the FTCA. First, the Act immunizes the federal government from tort liability when carrying out "discretionary functions," but does not define the term.[24] Second, the FTCA does not say whether the Act permits recovery on the basis of strict liability.[25] Whether the FTCA applies to governmental conduct that would not be engaged in by a private individual is also not stated.[26]

Some other problems have also been encountered in trying to interpret the FTCA. The FTCA contains an exception in its coverage for liability in cases of intentional torts, such as assault, battery, false imprisonment, malicious prosecution and others.[27] The courts have held this to mean that if the action could have been brought in battery, even though it would normally be brought in negligence, the exception applies.[28] For example, suppose a surgeon negligently operates on the wrong leg of a patient. Since this act is without consent, battery will lie. It makes no difference

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[23] Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.).

[24] *See* Dalehite v. United States, 346 U.S. 15 (1953). Under the FTCA, an action may not be brought against the government if the alleged injury occurred as a result of the exercise of a "discretionary function" on the part of a federal agency or employer. 28 U.S.C. § 2680(a) (1976). *Dalehite* interpreted "discretionary function" to include the initiation of programs and activities, as well as determinations made by executives or administrators in establishing plans, specifications and schedules of operation. 346 U.S. at 35-36.

See also James, *The Federal Tort Claims Act and the "Discretionary Function" Exception: The Sluggish Retreat of an Ancient Immunity*, 10 U. FLA. L. REV. 184 (1957); Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956).

[25] *See* Laird v. Nelms, 406 U.S. 797, 803 (1972) (holding that the FTCA does not authorize recovery on the basis of strict liability for ultrahazardous activity).

[26] *See* Indian Towing Co. v. United States, 350 U.S. 61, 64-65 (1955) (deciding that the federal government could be held liable under the FTCA for negligence in an activity which would not be done by a private individual).

[27] 28 U.S.C. § 2680(h) (1976).

[28] Moos v. United States, 225 F.2d 705, 706 (8th Cir. 1955).

that in performing the operation on the wrong leg the doctor was negligent. No action may be brought under the FTCA.[29]

The same approach has also been used in connection with misrepresentation. If information is conveyed by words, the FTCA[30] has precluded recovery, though the claim might have arisen out of negligence in rendering a service.[31] If an action for misrepresentation could possibly lie, the court formerly held that the case must be treated on this basis, therefore excluding a cause of action under the FTCA.[32] This way of refusing to recognize the gravamen of the cause of action is quite unreasonable. The Supreme Court, however, has recently indicated in *Block v. Neal*[33] that, while the government may be immune under the "misrepresentation" exception, it is not automatically immune from a distinct claim arising out of the same government conduct.[34]

There has now been a considerable amount of experience with the functioning of the FTCA. The state courts and legislatures have also had much experience with the subject of governmental immunities. All of this suggests that the time has arrived for a careful attempt to revise the FTCA.

B. *The Extent of Immunity Given to Governmental Officials*

Perhaps the major problem for the federal courts in connection with immunities is the issue of the extent of the immunity to be given to governmental officials. Traditionally, the leading case has been *Gregoire v. Biddle*,[35] in which Judge Learned Hand held that a federal prosecutor had full immunity even though the complaint alleged that he was acting maliciously, knowing that there was no justifiable basis for the prosecution.[36] Subse-

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[29] *See id.* at 706. *See also* Hernandez v. United States, 465 F Supp. 1071, 1074 (D. Kan. 1979) (surgeon operated after being told that the patient did not want the operation, summary judgment granted in favor of the government because of the battery nature of the claim).

[30] 28 U.S.C. § 2680(h) (1976).

[31] *See* United States v. Neustadt, 366 U.S. 696, 702-03 (1961) (holding that the true basis of the cause of action was misrepresentation rather than negligent inspection).

[32] *Id.* at 711.

[33] 103 S. Ct. 1089 (1983).

[34] *Id.* at 1094.

[35] 177 F.2d 579 (2d Cir. 1944), *cert. denied*, 339 U.S. 949 (1950).

[36] *Id.* at 581.

quently, in *Barr v. Matteo*,[37] an action for defamation, the Supreme Court held that even the lower levels of federal officials had immunity.[38] It was not entirely clear in that case, however, whether its rule extended beyond defamation to other kinds of torts, and a good deal of uncertainty resulted. Much of this has now been largely clarified by the case of *Butz v. Economou*.[39] This case recognized full immunity for legislative and judicial officials, including a prosecutor. *Butz* also indicated that even administrative officials have full immunity if they are engaged in an adjudicatory function or prosecutorial work.[40] For administrative officers engaged in other functions, the Court declared that the immunity (or privilege) is only qualified, depending on whether they act in good faith or not.[41]

The courts, at one time or another, have covered the full gamut regarding the immunity of government officials. Some cases find an official liable if a decision is wrong regardless of whether it had a reasonable basis or not. At the other extreme are the holdings that the official has complete immunity, as in the case of a judge or prosecutor. In between are two intermediate positions. One is that there is no liability if the official acted on the basis of a reasonable decision. The other is that the official is not liable if he acted in good faith—as indicated in *Butz*.[42] Sometimes these last two views are combined into a single test.[43]

It is interesting to draw an analogy between the tort liability of governmental officials and that of professionals. A negligence standard is used to determine professional malpractice. Professionals are held to a duty of reasonable care and to the state of knowledge, training and skill common to the profession. But there is no liability for a "mere error of judgment."[44] In addition, the

[37] 360 U.S. 564 (1959).

[38] *Id.* at 572-75.

[39] 438 U.S. 478 (1978).

[40] *Id.* at 514-15.

[41] *Id.* at 507.

[42] *Id.*

[43] *See* RESTATEMENT (SECOND) OF TORTS § 895D comment e (1979). For a collection of cases and law review articles discussing the immunity of public officers, see RESTATEMENT (SECOND) OF TORTS § 895D reporter's note (1982).

[44] There are many cases on this. On the liability of attorneys, see, e.g., Lucas v. Hamm, 364 P.2d 685 (Cal. 1961) *cert. denied*, 368 U.S. 987 (1962); Hodges v. Carter, 80 S.E.2d 144 (N.C. 1954).

standard for determining a reporter's liability for defamation is recklessness. If the statement is regarding a public figure, there must be knowledge of falsity or reckless disregard concerning the truth or falsity of the statement.[45]

How are these situations similar to that of the governmental official? They are similar in the sense that they, too, are concerned with jury controls. If the defendant is a trained professional, the court wants to be careful not to permit the jury to second-guess his decision in the way a Monday-morning quarterback does. Knowing now that a pass tried on Saturday or Sunday didn't work and the ball changed hands without the team making a touchdown, he has no trouble in deciding that the quarterback made the wrong choice of plays. The deference toward the professional that is involved in these cases is similar to that held to apply for a governmental official, the theory being that, like a doctor, or an attorney or a journalist, a governmental official is an experienced expert entitled to protection against jury second-guessing on the basis of knowledge of the outcome.

Another way to look at the tort actions against governmental officials is to recognize that the action amounts to a form of review of official action. Other ways usually exist to review that action, either administratively or through the court system. The courts may consider whether allowing an action brought to obtain monetary damages is the best way to conduct the review. This may, on occasion, affect the decision of whether a tort action should lie. Tort law has a number of purposes. The primary one is to provide compensation for an injury Another is to constitute a deterrent against engaging in the harmful conduct. Still another is to declare rights and to enforce them, make them effective. With respect to governmental officials, tort law may serve as an ombudsman, providing injured persons an avenue of redress.[46]

III. FEDERAL LEGISLATION AND TORT LAW

The heading for my third topic may give an erroneous impression. My discussion is not of statutes expressly providing for

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[45] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[46] *See* Linden, *Tort Law as Ombudsman*, 51 CAN. B. REV. 155 (1973) (discussing

tort liability, but instead of statutes that contain no such provision. If the legislation is inconsistent with a common law rule, the legislation will, of course, control. If there is no clear inconsistency and no express indication of whether the legislative provision applies to this situation, the custom is to look for the legislative intent. If that intent is clearly ascertainable there is still no difficulty; the intent will control. But if the intent is not indicated then real difficulty arises.

The typical situation may arise as follows: A congressional act proscribes certain conduct or directs that certain action be taken. This is done for the protection of an identifiable group of people. The act may provide for a criminal penalty but it does not provide for any civil relief through the use of a court action. The normal civil remedy would be a tort action for damages to compensate for the harm incurred. Should the court "imply" a tort action to meet this need?

This is basically a question of statutory construction, and one might assume that assistance could be obtained from the rules of statutory interpretation. Consider two well known maxims: *Ubi ius, ibi remedium*;[47] and *Expressio unius exclusio alterius est*.[48] As is usual in this field, the maxims go in opposite directions, and the court is left to find other means of reaching a decision.

The earlier Supreme Court cases[49] readily recognized a tort action when none was expressly provided, saying that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."[50] In 1975, this approach was reviewed in the case of *Cort v. Ash*,[51] where the Court laid down a set of four factors to be considered in determining whether to "imply" the tort action: (1) the plain-

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the potential function of tort law as a protector of "ordinary people from the abuse of governmental power").

[47] "Where there is a right, there is a remedy." BLACK'S LAW DICTIONARY 1363 (rev. 5th ed. 1979).

[48] "The expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 521 (rev. 5th ed. 1979). Under this maxim, if a statute specifies one exception to a general rule, other exceptions are excluded. *Id.*

[49] J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Texas & P Ry. v. Rigsby, 241 U.S. 33 (1941).

[50] 377 U.S. at 433.

[51] 422 U.S. 66 (1975).

tiff must be "one of the class for whose *especial* benefit the statute was enacted"[52] (2) there must be some "indication of legislative intent, explicit or implicit . . to create a remedy,"[53] (3) the remedy must be "consistent with the underlying purposes of the legislative scheme,"[54] and (4) it must not be inappropriate for federal law because it is "an area basically the concern of the States."[55] This, of course, had the effect of somewhat reducing the number of cases in which a tort action was permitted.

Later cases have tended to make the decision depend solely upon a finding of the intent of Congress, perhaps with a presumption one way or the other. We therefore find the courts talking about congressional intent when none was stated, delving into the legislative history and twisting it about to find a nonexistent intent. From time to time judges have shown an awareness of this. Justice Harlan, for example, speaking of the *Borak* case says:

> There we "implied" a private cause of action for damages. The exercise of judicial power involved in *Borak* simply cannot be justified in terms of statutory construction nor did the *Borak* court purport to do so. . The notion of implying a remedy, therefore, as applied to cases like *Borak*, can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law [56]

Traditionally available remedies include a declaratory judgment, an injunction, a rescission and an award of monetary damages. The statute having established the policy and created the right, the court simply supplies the remedy It makes no difference whether the action is called one in tort or not, so long as the remedy is one that is in the court's repertoire. This rationale effectively refutes the argument that the court is violating the principle of separation of powers in exceeding the constitutional judicial function. This is very similar to what the court does when it has

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[52] *Id.* at 78 (emphasis in original).
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 403 n.4 (1971) (Harlan, J., concurring) (emphasis in original).

before it a section 1983 action. The right is created by the statute, but the court must fill in the details and determine the appropriate remedy.[57]

Finding an "intent" when there is no intent is a hallucination, often covering up the real reasons that are influencing the justices. Sometimes the actual reasons are indicated when a court declines to imply a tort action. In a number of opinions, the concern is about the congressional act. These acts are often extremely complex and very detailed, particularly in the regulatory provisions. So many details are included in the act that the courts will be thoroughly swamped if they try to enforce them all with damage actions. This is the flood-of-cases rationale which is quite persuasive.

The clarity with which the right is expressed and whether enforcement of it by a tort action is needed to accomplish the essential purpose of the statute may be the most significant considerations. The members of the Supreme Court remain very sharply divided on whether to "imply" a cause of action in particular situations, and the division is usually close to being even. Currently, most of the cases are holding that a tort action will not lie.

The Supreme Court has been more willing to "imply" a cause of action for violations of constitutional provisions.[58] Since the decision in *Bivens*,[59] several cases have implied a cause of action for a constitutional violation.[60] Three reasons for this may be suggested. First, the constitutional right may be much more important than a statutory right. Second, the constitutional right is probably more clearly identifiable. Third, while Congress can easily provide for a damage action if it thinks that the Court wrongly failed to imply one, it is difficult to amend the Constitution for this purpose.

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[57] *Cf.* Carey v. Piphus, 435 U.S. 247 (1978) (although § 1983 does not include a provision for damages, the Court applied general tort principles, including the requirement of actual harm and the use of nominal damages). *See also* Robinson v. Wegmann, 436 U.S. 584 (1978) (application of state survivorship statutes to actions under § 1983).

[58] *See* Carlson v. Green, 446 U.S. 14 (1980) (8th Amendment); Davis v. Passman, 442 U.S. 228 (1979) (5th Amendment).

[59] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. at 388.

[60] *See, e.g.*, Carlson v. Green, 446 U.S. at 144; Davis v. Passman, 442 U.S. at 228.

Some years ago, in a symposium on statutory construction, Charles P. Curtis wrote an article entitled, "A Better Theory of Legal Interpretation."[61] He suggested that the question to ask when it is not possible to find an actual legislative intent is not what the legislature would have done if it had thought about the matter, but what it would do if it had that issue before it now.[62] While this may sound startling, it is a very interesting idea that may be quite useful. Consider some analogies. Suppose a federal district judge has a case before him raising a question that the Supreme Court ruled on a number of years ago. Further suppose that there are current indications that the Supreme Court might decide the issue otherwise today. Does the judge not try to divine what the Court would decide now? Or suppose it is a diversity case in which he must follow the state rules. Does he simply follow the last holding in the state even though it is now out-dated, or does he try to anticipate what the state court would now do?[63] There are numerous instances in which judges have taken the latter course. Unfortunately, there is no system for certifying a question of law to the Congress.

In the state courts the doctrine of negligence per se takes care of many of these cases. In state law the action of negligence already exists at common law. The court, however, may substitute a specific rule of conduct for the usual general standard of what a reasonably prudent person would do under the same or similar circumstances. It is a recognized part of the judicial function to do this when the court is convinced that the rule is proper as a substitute for the general standard. When there is a criminal statute or a regulatory provision, the court may take that provision and lay it down as a substitute for the general standard of negligence. The practice is very useful in the state courts and means that the courts do not have to "imply" a cause of action; they may simply adopt the provision as the specific rule of conduct to be applied in the particular case.[64]

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[61] Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1950).

[62] *Id.* at 414-15.

[63] *Id.* at 416-17.

[64] *See* RESTATEMENT (SECOND) OF TORTS §§ 285, 286 (1965); Clinkscales v. Carver, 136 P.2d 777 (Cal. 1943).

Unfortunately, this method cannot be used in the federal courts because there is no general federal common law of negligence into which it can fit. But the fact that the federal courts are unable to use the doctrine of negligence per se does not prevent the state court from doing exactly that. If the state court can take the provision in a state statute or municipal ordinance and make a violation of it negligence per se, it can certainly do the same thing with a violation of a federal statute, since all of the people in the state are supposed to obey the federal law as well as the state law.[65] Now, going one step further, assume a diversity action in federal court. Under the *Erie* doctrine the federal court must apply state law, and we thus may have the federal court using a federal statute to produce a judgment for a damages award even though the Supreme Court has said that Congress did not intend for a damages action to arise.[66]

The state courts, of course, are not confined to the doctrine of negligence per se. Most of the law of torts is common law In their capacity as originators and up-daters of tort common law, the courts may take a significant state policy indicated by a statute

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[65] *See, e.g.*, Steagall v. Dot Mfg. Corp., 446 S.W.2d 515 (Tenn. 1969) (Federal Hazardous Substances Act).

[66] *See* Gober v. Revlon, Inc., 317 F.2d 47 (4th Cir. 1963) (Federal Hazardous Substances Labeling Act); Orthopedic Equip. Co. v. Eutsler, 276 F.2d 455 (4th Cir. 1960) (Federal Food, Drug & Cosmetic Act).

See also Iconco v. Jensen Constr. Co., 622 F.2d 1291 (8th Cir. 1980). Defendant Jensen was low bidder on a construction contract for the Corps of Engineers subject to the Federal Small Business Act and plaintiff was second low bidder. Defendant had certified itself as a small business. However, it did not qualify, since the business done by its affiliates was counted as required by the Act. Making false statements to certify constituted a crime under the Act; but it did not provide for any civil relief and other courts had held that a cause of action could not be "implied" under the Act. *Id.* at 1297-99. In a diversity suit to recover for the unjust enrichment of the defendant at plaintiff's expense, the court held that there could be no claim for federal relief under the statute. It also held, however, that recovery was available under the Iowa common law. *Id.* at 1302. In determining that the profit under the contract was unjust enrichment, the Iowa court might look to the Federal Act to decide that the enrichment was unjust or improperly acquired. The Iowa court was not implying a cause of action; it would be applying its common law of restitution and the Congress did not impliedly prohibit the state from looking to the provisions of the Small Business Act "as a standard in determining whether Jensen has committed fraud or been unjustly enriched." *Id.* at 1299. This court decided that the Iowa court would find unjust enrichment, but would not find fraud because of lack of scienter. Under *Erie* in a diversity case, the court regarded itself as required to follow the Iowa law *Id.* at 1304.

and use it to create a new tort cause of action or to modify an existing tort action. All of this is discussed in some detail in section 874A of the Restatement (Second) of Torts,[67] where examples and citations are given and the special features of the federal situation are also treated.[68]

A very apt treatment in a state court may be found in *Burnette v. Wahl*,[69] where the Oregon Supreme Court considered whether the Oregon statute making it a felony to abandon one's own child should be treated as a basis for giving rise to a tort action for damages based on psychological injury to a child abandoned by its mother. Three separate approaches are presented in as many opinions, and each is quite well developed.[70]

IV. THE FIRST AMENDMENT AND TORT LAW

Eighteen years ago the Supreme Court decided the case of *New York Times v. Sullivan*.[71] This was a true case of a court "making law." The state of constitutional law was profoundly different after the decision. But I am not deprecating the case or accusing the Court of exceeding its judicial function. The Court saw a vital need and met it. The action for libel was being utilized as a legal blackjack to beat the newspapers into ceasing their treatments of certain significant social issues. Whether that conduct violated the free speech and free press clauses had not previously been before the Court, and the issue was properly addressed and decided.

The other leading case on defamation and the first amendment is *Gertz v. Robert Welch, Inc.*[72] Together, *Gertz* and *New York Times* have settled some of the essential constitutional requirements for a defamation action, whether the plaintiff is a public figure or a private person. These requirements include (1) fault on the part of the defendant regarding truth or falsity and

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[67] *See* RESTATEMENT (SECOND) OF TORTS § 874A comments a-f, h-j (1979).

[68] *See* RESTATEMENT (SECOND) OF TORTS § 874A comment g (1979).

[69] 588 P.2d 1105 (Or. 1978).

[70] *Id.* at 1105, 1112 (Lent, J., concurring in part, dissenting in part), 1115 (Linde, J., dissenting).

[71] 376 U.S. 254 (1964).

[72] 418 U.S. 323 (1974).

(2) "actual damages."[73] But there are many new problems raised by these cases that the Court has not yet considered, much less settled. The Court is feeling its way as it moves slowly It has made some false starts that have forced it to change its position.

A. *The First Amendment and the Tort of Defamation*

The Supreme Court has yet to take a stand on several first amendment issues. One such issue is whether the first amendment applies to determine if a communication is defamatory. This problem actually came before the Court in 1941, long before the decision in *New York Times*.[74] A newspaper charged a congressman with opposing the appointment of an attorney as federal judge solely because he was Jewish. The federal district court dismissed the complaint in a libel suit brought by the congressman. The Second Circuit reversed by a vote of two to one, and the Supreme Court granted certiorari. It allowed briefs amici curiae from several groups, but finally dropped the case with a single-sentence per curiam memorandum reading simply, "The judgment is affirmed by an equally divided court."[75] I suspect that the Court will continue to avoid the problem of a constitutional definition of defamatory statements because of its experience in trying to state a constitutional definition of obscenity.

Another undecided issue is whether a false statement of fact is required for liability to arise. Can liability be imposed constitutionally for an expression of opinion? Does the form of the expression control? This is a complex and difficult problem in which three Supreme Court opinions have some relevance but do not clearly settle the issue.[76] There are also a good many federal and state court holdings, some of which adopt the solution presented by Section 566 of the Second Restatement of Torts.[77] The problem re-

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[73] *Id.* at 348-49.

[74] *See* Sweeney v. Schenectady Union Publishing Co., 122 F.2d 288 (2d Cir. 1941), *aff'd mem.*, 316 U.S. 642 (1942).

[75] 316 U.S. at 642.

[76] *See* Gertz v. Robert Welch, Inc., 418 U.S. at 339-40; Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 283-84 (1974); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970).

[77] The section provides: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies

mains. A number of closely related ones may also raise a constitutional question. What about a remark made in jest? What about mere abusive language, which was not intended to be taken literally? What of a slip of the tongue or the pen? What of a statement of opinion that is not really the speaker's honest opinion?[78]

Third, does the constitutional requirement of fault apply to the colloquium?[79] The problem presented by *Bindrim v. Mitchell*[80] is especially pertinent. Defendant, a novelist, wrote a novel (*roman à clef*) about a psychologist who used a "group nude-therapy" technique for treating the psychological inhibitions of his patients. The psychologist was pictured as foul-mouthed and gross in appearance and manners. Plaintiff was a licensed clinical psychologist who used the nude-therapy technique in Los Angeles.[81] Though the name was different and other attributes of the character in the novel differed substantially from those of plaintiff, he regarded the differences as defamatory, contending that people associated them with him. The California Court of Appeals upheld a verdict for the plaintiff,[82] and the supreme courts of both California and the United States declined to hear the case.[83]

Fourth, what defendants are entitled to the protection of *New York Times* and *Gertz*? The press and other news media can clearly claim the protection. What about nonmedia defendants? Although the Court declared in a footnote that it "has never decided .

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the allegation of undisclosed defamatory facts as the basis for the opinion." *See also* RESTATEMENT (SECOND) OF TORTS § 566 comments a-c (1977).

[78] For cases and articles on these matters, see PROSSER, WADE & SCHWARTZ, CASES AND MATERIALS ON TORTS 996-97 (7th ed. 1982).

[79] A colloquium is:

> one of the usual parts of the declaration in an action for slander. It is a general averment that the words complained of were spoken "of and concerning the plaintiff," or concerning the extrinsic matters alleged in the inducement, and its office is to connect the whole publication with the previous statement. An averment that the words in question are spoken of or concerning some usage, report, or fact which gives to words otherwise indifferent the peculiar defamatory meaning assigned to them.

BLACK'S LAW DICTIONARY 240 (rev. 5th ed. 1979).

[80] 155 Cal. Rptr. 29 (Cal. Ct. App.), *cert. denied*, 444 U.S. 984 (1979).

[81] *Id.* at 33.

[82] *Id.* at 41.

[83] 444 U.S. at 984.

whether the *New York Times* standard can apply to any individual defendant other than a media defendant,"[84] the fact is that it did apply the standard on behalf of "four individual petitioners" in *New York Times*[85] itself, and took similar action in several other cases, all without regarding the issue as of sufficient consequence to discuss.[86] A number of other courts have expressly held that nonmedia defendants are entitled to the *New York Times* standard, so that this issue seems settled by the cases.[87] On the issue of whether the *Gertz* protection also applies to nonmedia defendants the authorities are more evenly divided,[88] but I feel strongly that it should apply.

Fifth, on the issue of truth or falsity of the defamatory statement, where should the burden of proof lie? Traditionally, truth has been a defense to be raised and proved by the defendant. But, if the plaintiff must now allege and prove defendant's fault regarding the truth or falsity, does that have the effect of requiring him to prove falsity as well? A Sixth Circuit case held that it does,[89] but, although the Supreme Court granted certiorari,[90] the case was settled before it could be decided.

Sixth, where is the rule on public figures going? When the *New York Times* rule was extended beyond public officials to public figures in *Curtis Publishing Co. v. Butts*,[91] *Gertz* had not been decided and the choice was between the *Butts* rule and the common law Since the decision in *Gertz* with its requirement of fault for even private plaintiffs, the Court has been steadily narrowing the definition of public figure.[92] Will it eventually eliminate this

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[84] Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979) (dictum).

[85] 376 U.S. at 256.

[86] *See, e.g.*, St. Amant v. Thompson, 390 U.S. 727 (1968); Henry v. Collins, 380 U.S. 356 (1965); Garrison v. Louisiana, 379 U.S. 64 (1964).

[87] *See, e.g.*, Avins v. White, 627 F.2d 637, 649 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980); Davis v. Schuchat, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975); Woy v. Turner, 533 F Supp. 102, 104 (N.D. Ga. 1981); Bussie v. Larson, 501 F Supp. 1107, 1114 (M.D. La. 1980); Anderson v. Low Rent Housing Comm'n, 304 N.W.2d 239, 247 (Iowa), *cert. denied*, 454 U.S. 1086 (1981); DeCarvalho v. daSilva, 414 A.2d 806, 813 (R.I. 1980).

[88] See PROSSER, WADE & SCHWARTZ, *supra* note 78, at 1045-46 for citations.

[89] *See* Wilson v Scripps-Howard Broadcasting Co., 642 F.2d 371 (6th Cir. 1981).

[90] 454 U.S. 962 (1981).

[91] 388 U.S. 130 (1967).

[92] *See, e.g.*, Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979) (in a libel action brought against the author and publisher of a book which named him as a Russian

classification and leave the "knowledge-or-reckless-disregard" standard for public officials alone?

Seventh, what is to be the test for loss of a conditional privilege because of abuse? Under the majority rule at common law, if a conditional privilege existed, it was treated as abused and therefore lost if the defendant did not believe in the truth of this statement or have reasonable basis for that belief. This is equivalent to a negligence test. But under the *Gertz* rule it is necessary to prove negligence in all cases.[93] The combination of these two rules would eliminate the significance of the conditional privilege. The Restatement, therefore, in accordance with the minority rule at common law, adopts the "knowledge-or-reckless-disregard" test for abuse.[94] Several courts have agreed with this position[95] but the Supreme Court has not yet considered the question.

Eighth, what is the present status of the privilege of fair comment? The Restatement indicates that if recovery is not allowed for an expression of a mere opinion with no implication of a false statement of fact, the traditional privilege of fair comment has been absorbed into the broader opinion rule.[96] The Supreme Court has given no hint of its position.

Finally, what developments will take place regarding the scope of the "reporter's privilege"? This issue has many potential problems. The Court has apparently adopted the *New York Times* and *Gertz* standards when it comes to interpreting an ambiguous public

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spy, an admitted Russian spy's nephew, who during a 1957-58 grand jury investigation of Soviet intelligence agents in the United States failed to respond to a grand jury subpoena, was not a "public figure"); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (behavioral scientist engaged in federally funded animal research was not "public figure," either by virtue of his successful application for federal funds, or by virtue of his access to media while responding to receipt of the "Golden Fleece of the Month Award" by the federal agencies responsible for his funding); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (Mary Alice Firestone, wife of the scion of a wealthy industrial family, was not a "public figure" for holding a few press conferences during a sensationalized divorce proceeding).

[93] 418 U.S. at 350.

[94] *See* RESTATEMENT (SECOND) OF TORTS § 593 (1977),and the Special Note immediately preceding that section.

[95] *See* British Am. & E. Co. v. Wirth, Ltd., 592 F.2d 75 (2d Cir. 1979); Luster v. Retail Credit Co., 575 F.2d 609 (8th Cir. 1978); Brown v. Skaggs-Albertson's Properties, Inc., 563 F.2d 983 (10th Cir. 1977); Jacron Sales Co. v. Sindorf, 350 A.2d 688 (Md. 1976); Moore v. Smith, 578 P.2d 26 (Wash. 1978).

[96] RESTATEMENT (SECOND) OF TORTS § 566 (1977).

record holding that the *New York Times* standard requires merely that the published interpretation of the public record be a rational one,[97] while *Gertz* requires that the interpretation must also be reasonable.[98] This is itself somewhat ambiguous. Will the privilege be extended beyond reporting on official meetings to public meetings in general; or beyond that to the Second Circuit's "fundamental principle of neutral reportage,"[99] a "disinterested reporting" of charges made by a "responsible" organization or person?[100]

This list of pending problems in adjusting the relationship of the traditional tort of defamation to the restrictions of the first amendment could be extended further, but it is quite long enough for the present purpose.

In two instances, the Supreme Court may have taken a "misstep" but it still has the opportunity to correct it. The first involves the way in which the *New York Times* standard is stated.[101] The expression "actual malice" is used for knowledge or reckless disregard involving the falsity of the defamatory statement. The law of defamation was already plagued by the use of the term, "malice," in at least three other situations, each with a different meaning, none of which is the dictionary meaning.[102] "Actual malice" certainly cannot be read in a literal sense. It would have been much better to speak of knowledge or reckless disregard, or perhaps even of good faith.

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[97] Time, Inc. v. Pape, 401 U.S. 279, 290 (1971).

[98] *See* Time, Inc. v. Firestone, 424 U.S. at 448 (1976).

[99] Edwards v. National Audubon Soc'y, Inc., 556 F.2d 113, 120 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977).

[100] *See* 556 F.2d at 113. *Contra* Dickey v. CBS Inc., 583 F.2d 1221 (3d Cir. 1978).

[101] 376 U.S. at 279-80 (a public official may not recover "for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not").

[102] The first is so-called "malice in law" and is completely fictitious. *See* Bromage v. Prosser, 107 Eng. Rep. 1051 (K.B. 1825); PROSSER, WADE & SCHWARTZ, *supra* note 78, at 1020-22. The other two are often called "actual malice." One of them is used to indicate abuse of a privilege. A privilege is abused and lost if the defendant acts for a purpose other than that for which the privilege is established. Although malice in the sense of ill-will may be an abuse under this rule, the rule is much broader in its scope. *See* PROSSER, TORTS 794-95 (4th ed. 1971). The second use of "actual malice" is in regard to the award of punitive damages. Here, too, "actual malice" in the sense of ill-will is not the only basis for award of punitive damages. *Id.* at 794.

But, more importantly, there was a mistake in defining knowledge or reckless disregard solely from a subjective standpoint.[103] As the court itself admitted, this subjective test "puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity "[104] Much difficulty would have been avoided if the test had been stated in the alternative, with the second half made objective. For example, to use the Court's language, the publication must have been "so inherently improbable that only a reckless man would have put [it] in circulation" without making at least a minimum check on its accuracy.[105] This would not be adopting a negligence standard.

The second "misstep" involves damages. *Gertz* held that, in the absence of proof of knowledge or reckless disregard, damages must be "restrict[ed] . to compensation for actual injury."[106] As a constitutional requirement, this afforded the courts an effective control over jury verdicts for excessively large amounts. Properly developed, the concept might have gone far to reduce some of the abuses of defamation litigation today. Indeed, recovery might have subsequently been limited to pecuniary loss, provided that the term would be interpreted to include the plaintiff's reasonable attorney's fees, as a part of the cost of vindicating his reputation.[107] This "reform" might instead remake the nature of a defamation action and turn it back again to an action for vindication of reputation. But the court has failed to utilize the opportunity. In *Time, Inc. v. Firestone*,[108] it decided to review an award of $100,000 for mental distress when the plaintiff did not claim damages for injury to reputation. Since that time big damage awards, including punitive damages, have become common place.

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[103] St. Amant v Thompson, 390 U.S. at 731 (the defendant must have "in fact entertained serious doubts as to the truth of the publication").

[104] *Id.* The Court did not respond to this change. The recent motion picture, *Absence of Malice*, vividly portrays how unscrupulous journalists may seek to take advantage of this "loophole."

[105] *Id.* at 732.

[106] 418 U.S. at 349.

[107] *See* the treatment in PROSSER, WADE & SCHWARTZ, *supra* note 78, at 1078-80.

[108] 424 U.S. 448 (1976).

It was exactly this type of situation, with huge damage awards for the purpose of controlling what a newspaper printed, that precipitated the holding in the seminal case of *New York Times v. Sullivan.*

B. *The First Amendment and Other Common Law Torts*

The Supreme Court has also held that the first amendment affects the tort of unreasonable invasion of the right of privacy.[109] Here, too, many quite difficult constitutional questions remain to be settled. In holding, in *Cox Broadcasting Co. v. Cohn*,[110] that there could be no cause of action for disclosure of true facts contained in a public record, even though they would be highly embarrassing to a reasonable person,[111] the Court was simply taking the established common law tort rule and making it a rule of constitutional law. Other tort limitations on the action for public disclosure of embarrassing facts will probably also be adopted. For example, the Court at some point will probably clarify what facts must be disclosed about a public figure to give rise to a cause of action. The major question, not yet settled, is whether the first amendment permits any action at all for public disclosure of true facts.[112] Another question: May a public figure acquire a private status through the passage of time?[113]

With regard to false-light privacy cases, the Court held early, in *Time, Inc. v. Hill*,[114] that the *New York Times* standard applied to false-light cases in general.[115] *Gertz*, by establishing a negligence standard[116] and refusing to extend the *New York*

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[109] Time, Inc. v. Hill, 385 U.S. 374 (1967).

[110] 420 U.S. 469 (1975).

[111] *Id.* at 496.

[112] On this issue, see Virgil v. Time, Inc. 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1975); Briscoe v. Reader's Digest Ass'n, Inc., 483 P.2d 34 (Cal. 1971). Both indicate that the answer to the question is in the affirmative.

[113] *Cf.* Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir.) (a person who becomes a public figure in connection with a particular controversy retains that status for later comments on that same controversy), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981) (dismissal of certiorari was because the case was settled).

[114] 385 U.S. at 374.

[115] *Id.* at 390-91.

[116] 418 U.S. at 346.

Times standard to private individuals as the plurality in *Rosenbloom v. Metromedia, Inc.*,[117] had suggested, has thrown the continued validity of *Time v. Hill* into serious question. It will take a Supreme Court decision to settle that issue for us.[118]

Another form of unreasonable invasion of the right of privacy is that of wrongful intrusion, which may occur because of a physical intrusion or intrusion into the plaintiff's private affairs. How far will the implications of this come under the control of the first amendment?

Another tort to be affected by the first amendment is that of injurious falsehood.[119] It differs from defamation in that its purpose is not to compensate for harm to the plaintiff's personal reputation but instead to compensate for pecuniary loss (called special damages) incurred because of a false statement published about the plaintiff, his property or his business. Although the Supreme Court has not spoken on the matter, there seems little doubt that some of the common law elements will become constitutional requirements, and additional ones may be imposed. What is involved here is commercial speech, which is now held to be entitled to constitutional protection[120] but subject to what may be a different balance drawn between the conflicting interests.[121] This issue remains to be worked out definitively There is also the question of the basis on which to draw a line for determining when the *New York Times* standard and the *Gertz* standard should be applied. Several federal district court cases treat these matters.[122]

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[117] 403 U.S. 29 (1971) (Court applied a standard of knowing falsity when an allegedly defamatory statement related to plaintiff's involvement in a matter of public concern, whether plaintiff was a public figure or a private individual).

[118] In Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974), the Supreme Court found it unnecessary to decide the issue, since the defendant's conduct was held to meet the *New York Times* test.

[119] *See* RESTATEMENT (SECOND) OF TORTS §§ 623A-652 (1977); Prosser, *Injurious Falsehood: The Basis of Liability*, 59 COLUM. L. REV. 425 (1959).

[120] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

[121] *Cf.* Cox Broadcasting Co. v. Cohn, 420 U.S. at 500 (Powell, J., concurring).

[122] *See*, e.g., Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980); Bose Corp. v. Consumers Union, 508 F Supp. 1249 (D. Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *cert. granted*, 103 S. Ct. 1872 (1983). *See also* Horning v. Hardy, 373 A.2d 1273 (Md. Ct. Spec. App. 1982).

The torts of interference with contractual relations or with prospective economic advantage also frequently involve the use of speech. It will undoubtedly be necessary to compare the elements of these torts with the first amendment and work out the appropriate adjustment. As a matter of fact the Supreme Court did exactly that quite recently in the case of *NAACP v. Claiborne Hardware Co.*,[123] setting aside a judgment in favor of white merchants in Port Gibson, Mississippi, for peaceful boycotting by blacks against the plaintiff in order to obtain fairer and more equitable treatment from the plaintiffs.

The several torts of misrepresentation also involve use of speech. Suits for deceit and negligent misrepresentation require fault and are therefore not likely to run afoul of the first amendment. But what of a misrepresentation action based on innocent misrepresentation, or even mistake? What about a suit for nondisclosure, or failure to speak? For that matter, what about a products liability action based on strict liability under Restatement section 402B,[124] on express warranty coming from a casual remark in negotiations, or on a failure to warn of danger or provide adequate instructions?[125]

CONCLUSION

Let me close by offering two further independent thoughts. A good number of tort cases will come before the federal courts in the immediate future. They will involve difficult questions and present interesting and intellectually stimulating problems, much more so than many of the cases now coming before the courts. Some of these problems have been created by the Supreme Court's efforts to reduce the flood of cases coming before it and the other federal courts. Ironically, at least as far as the appellate courts are concerned, these efforts sometimes seem to have had the opposite effect.

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[123] 102 S. Ct. 3409 (1982).

[124] RESTATEMENT (SECOND) OF TORTS § 402B (1965).

[125] For a previous treatment of most of the matters in this section, see Wade, *The Communicative Torts and The First Amendment*, 48 MISS. L.J. 671 (1977).